

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1424

COMMONWEALTH

vs.

DONALD CUE.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The Commonwealth appeals from an order of a judge of the West Roxbury Division of the Boston Municipal Court (BMC) allowing the defendant, Donald Cue's, motion to withdraw his guilty plea. We affirm.

Background. In August 2007, the defendant was charged with a number of drug offenses in the West Roxbury Division of the BMC. At the time, he was on probation in the Dorchester and Roxbury divisions of the BMC. In October 2007, the defendant stipulated to a violation of probation in the Dorchester Division and was sentenced to committed time. The following month, he was sentenced to committed time in the Roxbury Division for violating his probation. On December 13, 2007, the defendant pleaded guilty in the underlying West Roxbury case and was sentenced to concurrent committed time. In January 2017,

the Commonwealth assented to the defendant's motion to vacate his convictions in the Dorchester Division based on the misconduct of the drug analyst Annie Dookhan.¹ The Commonwealth filed a nolle prosequi.

On April 14, 2017, the defendant, acting pro se, filed a motion to withdraw his guilty plea in the West Roxbury Division citing the nolle prosequi filed in the Dorchester Division. The motion was supplemented by counsel after his appointment. Following an evidentiary hearing at which the defendant and plea counsel testified, the motion judge allowed the motion on grounds other than those raised by the defendant. She ruled that there was insufficient evidence in the record that the plea judge had conducted a constitutionally adequate plea colloquy.

The Commonwealth filed two motions for reconsideration. The first motion was denied after a hearing. The second motion was supplemented with an "affidavit" of the plea judge as to his regular plea practice at the time of the defendant's plea. Following a hearing, the motion judge denied the motion. This appealed followed.

Analysis. "A motion to withdraw a guilty plea is treated as a motion for a new trial pursuant to Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001)." Commonwealth v.

¹ See generally Commonwealth v. Scott, 467 Mass. 336 (2014).

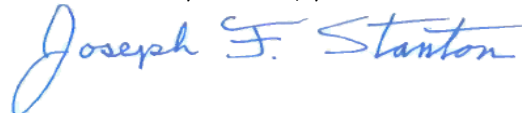
Lavrinenko, 473 Mass. 42, 47 (2015), quoting Commonwealth v. DeJesus, 468 Mass. 174, 178 (2014). Motions for a new trial are committed to the sound discretion of the judge. Commonwealth v. Prado, 94 Mass. App. Ct. 253, 255 (2108), citing Commonwealth v. Moore, 408 Mass. 117, 125 (1990). "[A] judge's discretionary decision constitutes an abuse of discretion where we conclude the judge made 'a clear error of judgment in weighing' the factors relevant to the decision, . . . such that the decision falls outside the range of reasonable alternatives" (citation omitted). L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014). It is the Commonwealth's burden to demonstrate that a plea was validly obtained.

Where, as here, "a contemporaneous record of the plea proceedings no longer exists due to the passage of time," a court will first presume the proceedings were valid, and not constitutionally defective, a concept known as the presumption of regularity. Commonwealth v. Cartagena, 466 Mass. 1021, 1022 (2013). "This presumption of regularity, normally afforded collateral review of proceedings in which the record has been lost or destroyed, stands, unless and until a defendant advances countervailing credible and persuasive evidence sufficient to rebut that presumption." Commonwealth v. Hoyle, 67 Mass. App. Ct. 10, 14-15 (2006).

Here, the motion judge found that the defendant rebutted the presumption of regularity because of the plea judge's failure to sign section IV of the tender of plea form, and the failure of the clerk to indicate on the first page of the docket sheet that there was a plea colloquy. The Commonwealth's submission of additional tender of plea forms in other cases, signed by the plea judge, does not improve its position. These documents show that at the time of this defendant's plea, the plea judge regularly signed section IV of the tender of plea form. Indeed, in this case, the fact that the plea judge signed some aspects of the tender of plea form but not others reasonably suggests that the judge had the form in his hands, but did not conduct the required colloquy. On this record, we conclude the motion judge did not abuse her discretion.

Order allowing motion to
withdraw guilty plea
affirmed.

By the Court (Blake, Kinder &
Desmond, JJ.²),



Clerk

Entered: July 3, 2019.

² The panelists are listed in order of seniority.